No. 96-1370

In The

Supreme Court of the United States

October Term, 1996

In re:

DENISE RENEÉ BEASLEY.

FIDELITY FINANCIAL SERVICES, INC.,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the bankruptcy preference law establish a uniform national relation-back period for the perfection of security interests, or does it defer to the vagaries of local law to give secured creditors an indefinite and unlimited period in which to perfect?

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SUMMARY OF ARGUMENT

The plain language of § 547(e)(2)(A)[1] establishes a uniform federal relation-back period during which secured creditors must complete the acts necessary for perfection of their security interests. This is the only reading of the statute that gives effect to the related § 547(c)(3) enabling loan defense and to the § 547(e)(2)(C)(ii) post-petition perfection provision. Further, it is the only reading that harmonizes § 547(e)(2)(A) with the § 362(b)(3) post-petition perfection exception to the automatic stay and the general relation-back provision of § 546(b). It is also the only interpretation that furthers the anti-secret lien policy of bankruptcy preference law. Finally, both the legislative history and the derivation of that provision from prior law confirm that the plain language interpretation of § 547(e)(2)(A) is what Congress intended.

ARGUMENT

I.

THE PLAIN MEANING OF THE STATUTE ESTABLISHES A UNIFORM FEDERAL RELATION-BACK PERIOD FOR PURCHASE MONEY SECURITY INTERESTS.

The complex "transfer timing" rules of the Bankruptcy Code's preference provisions date security interest transfers to the time when the security interest is perfected, unless that interest is perfected within the applicable 10-day and 20-day grace periods of § 547(e)(2)(A). If the interest is perfected within

1. The Bankruptcy Code is codified at Title 11 of the United States Code. The text of this brief refers to sections of the "Bankruptcy Code" or "Code." These section references translate without alteration to section references in Title 11 of the United States Code.

the applicable § 547(e)(2)(A) grace period, then the preference transfer date relates back to the date of attachment (*i.e.* the date that the transfer takes effect between the parties). The transfer dates are critical both for determining two elements of the trustee's *prima facie* preference case: (1) whether the transfer occurs within the 90-day preference look-back period; and (2) whether it is a transfer for an "antecedent debt."

The pivotal issue in the instant case is whether § 547(e)(2)(A) uses perfection in its ordinary sense to refer to the date when the last act required for perfection under applicable state law was performed, or whether it also incorporates the state law "relation-back" fiction to deem perfection to have occurred at an earlier point in time.

A. The Language Of The Statute Has Been Uniformly Interpreted To Establish A Uniform Relation-Back Period.

Although both Petitioner and Amici Curiae contend that their position is based on the plain language of the Bankruptcy Code, their arguments overlook the fact that the 1994 amendments changed the language of § 547(e)(2)(A) that both they and the cases cited in their briefs rely upon. *See* Bankruptcy Reform Act of 1994, § 203(1, 2), Pub. L. No. 103-393, 108 Stat. 4106 (1994). The 1994 amendments added the language "except as provided in subsection (c)(3)(B)" to the end of § 547(e)(2)(A). This new cross-reference to the § 547(c)(3) "enabling loan" exception, pulls purchase money security interests like Petitioner's out of the general rule of § 547(e)(2)(A) and places them squarely within the 20-day period established by the 1994 amendment's revision to § 547(c)(3)(B). Petitioner has not cited, and Respondent is not aware of a single case interpreting the revised language in the manner that Petitioner asserts is so plain.

True, there was some confusion about whether

§ 547(e)(2)(A) incorporated the varying state law relation-back periods prior to the 1994 amendment. While recognizing the clear Congressional intent to establish a uniform 10-day relation-back period, and while acknowledging that the statutory language conformed to that intent, the bankruptcy court in *In re Burnette*, 14 B.R. 795 (Bankr. E.D. Tenn. 1981), relied on policy arguments to hold that § 547(e) incorporated state law relation-back periods.[2] That view was followed and adopted by the Tenth and Eleventh Circuits. *See Webb v. GMAC (In re Hesser)*, 984 F.2d 345 (10th Cir. 1993); *GMAC v. Busenlehner (In re Busenlehner)*, 918 F.2d 928, 931 (11th Cir. 1990), *cert. denied*, *Moister v. GMAC*, 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991).[3] In contrast, the Fifth and Ninth Circuits deferred to Congressional intent and held that the Bankruptcy Code established a uniform federal relation-back period. *See Pongetti v. GMAC (In re Locklin)*, 101 F.3d 435, 442 (5th Cir. 1996); *Fitzgerald v. First Security Bank of Idaho (In re Walker)*, 77 F.3d 322, 323 (9th Cir. 1996); *Howard Thornton Ford, Inc. v. Fitzpatrick (In re Hamilton)*, 892 F.2d 1230, 1235 (5th Cir. 1990). The great majority of bankruptcy courts agreed.[4]

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2. After an exhaustive review of the legislative history, the *Burnette* court stated:

> It is evident that Congress did not intend for state law grace periods to be relevant under the preference statute. There was to be a uniform rule throughout the nation. In any jurisdiction, a transferee was to have only ten days to perfect a transfer and thereby avoid the antecedent debt problem.

Id. at 801.

3. *Busenlehner* was followed by one bankruptcy court. *See In re Power*, 133 B.R. 242, 244 (Bankr. N.D. Okla. 1991). In addition, one case appears to adopt the relation-back theory without discussion. *See In re Harley*, 41 B.R. 276, 281 (Bankr. N.D. Ga. 1984).

4. *See Long v. Joe Romania Chevrolet, Inc. (In re Loken)*, 175 B.R. 56,
(Cont'd)

Further, even under the prior language, the leading scholars and treatise writers had no difficulty concluding that § 547(e)(2)(A) established a uniform 10-day period for the perfection of purchase money security interests, and that *Burnette*, *Hesser*, and *Busenlehner* were incorrectly decided. As Barkley Clark, author of a leading treatise on secured transactions said of the pre-1994 version of § 547(e)(2)(A):

> It would seem that the Fifth Circuit has the better of the argument. The 10-day rule found in the preference provision is *clear and unambiguous*. It was drafted at a time when it conformed to the UCC provision. The fact that the UCC has since been liberalized does not change the *plain language* of the federal statute. And although § 547(e)(1)(B) defers to state law in supporting the relation-back concept, reading it as the Eleventh Circuit did completely ignores the 10-day provision. If the Bankruptcy Code is to be amended to make it conform more closely to the liberalized UCC, the amendment should come from Congress and not the courts.

Barkley Clark, *The Law of Secured Transactions* ¶ 6.03[2][b] and 6-39 (rev. ed. 1993) (emphasis added).

(Cont'd)

61-62 (9th Cir. B.A.P. 1994); *In re Holloway*, 132 B.R. 771, 773-75 (Bankr. N.D. Okla. 1991); *In re Carson*, 119 B.R. 264, 267 (Bankr. E.D. Okla. 1990); *In re Holder*, 94 B.R. 395, 398-99 (Bankr. M.D. N.C. 1988), *aff'd on other grounds*, 94 B.R. 394 (M.D. N.C. 1988), *aff'd*, 892 F.2d 29 (4th Cir. 1989); *In re Scoviac*, 74 B.R. 635, 637-38 (Bankr. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445, 448, 451 (Bankr. M.D. Tenn.), *aff'd*, 33 B.R. 112 (M.D. Tenn. 1983).

Other scholars and treatise writers agreed with Clark's conclusion that the pre-1994 preference timing rules of § 547(e)(2)(A) established a uniform federal grace period for perfection. In their treatise on bankruptcy law, Epstein, Nickles, and White concluded that "the critical inquiry under § 547(e) is whether and when the necessary steps [to perfect] have been taken," and that the 10-day rule of § 547(e) is "preemptive and controlling" even when the state law relation-back period is longer. David G. Epstein, Steve H. Nickles, & James J. White, *Bankruptcy* § 6-12, pp. 547, 550 (Practitioners ed. 1992). Both Collier on Bankruptcy and the White and Summers treatise on the Uniform Commercial Code agreed that state law relation-back rules were not relevant in preference actions. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* § 25-7, pp. 447-48 (3d ed. 1988); 4 L. King, *Collier on Bankruptcy* ¶ 547.11, pp. 547-54, n. 2, *reprinted in In re Walker*, 161 B.R. at 496. Other scholars criticized the *Burnette* interpretation not only because of its disregard for Congressional intent, but also because of the violence its reading of § 547(e)(2)(A) did to the intricately designed and interrelated statutory provisions. *See* Thomas M. Ward & Jay A. Shulman, *In Defense of the Bankruptcy Code's Radical Integration of the Preference Rules Affecting Commercial Financing*, 61 Wash. U.L.Q. 1, 87 n. 277 (1983) (referring to *Burnette's* refusal to follow the Congressional design of § 547(e) as "a stunning judicial tour de force"); Irving A. Breitowitz, *Article 9 Security Interests as Voidable Preferences*, 3 Cardozo L. Rev. 357, 394-398 (1982) (*Burnette's* reading of § 547(e)(2)(A) rendered § 547(e)(2)(C)(ii) mere surplusage).

As Clark suggested, the liberalizing change ultimately did come from Congress in the form of the 1994 amendments, which govern this case. Congress amended the § 547(c)(3) enabling loan exception to expand its safe harbor period from 10 to 20 days, thus giving purchase money secured creditors 20 days

following the date of the debtor's possession of the collateral in which to perfect. *See* Bankruptcy Reform Act of 1994, § 203(1). Congress also amended § 547(e)(2)(A) to add an express cross-reference to the newly amended 20-day provision of § 547(c)(3)(B). *See* Bankruptcy Reform Act of 1994, § 203(2). While *Burnette's* incorporation of state law relation-back periods into the term "perfected" as used in the pre-amendment version of § 547(e)(2)(A) resulted in a strained reading of the statute, the changes made by the 1994 amendments render such a reading patently absurd.

This has been the uniform interpretation of the post-1994 version of § 547 by the courts, treatise writers, and scholars. Not a single published opinion adopts Petitioner's interpretation of the current language of § 547(e)(2)(A). Instead, the Eighth Circuit, in the opinion appealed from, the Ninth Circuit, and the bankruptcy courts have uniformly concluded that § 547(e)(2)(A) means what it says — that a uniform federal grace period applies in determining the time of transfer for preference purposes. *See Fink v. Fidelity Financial Service, Inc.*, 102 F.3d 334, 335 (8th Cir. 1996), *cert. granted*, __ U.S. __, 117 S. Ct. 1690, 137 L. Ed. 2d 818 (1997); *Walker*, 77 F.3d at 324 (9th Cir. 1996) (*dicta* referring to the 1994 amendments); *Loken*, 175 B.R. at 62 (9th B.A.P. 1994) (*dicta* referring to the 1994 amendments); *In re Smallwood*, 204 B.R. 519, 520 (Bankr. E.D. Ky. 1997); *In re Ross*, 193 B.R. 902, 904 (Bankr. W.D. Mo. 1996); *see also In re W.T. Vick Lumber Co., Inc.*, 179 B.R. 283, 290-91 (Bankr. N.D. Ala. 1995) (*dicta* critical of *Busenlehner*).

Further, the major treatise writers on bankruptcy and secured transactions read the current law as establishing a uniform 20-day perfection period for purchase money security interests, rather than a variable period that turns on the vagaries of state law. Clark reads the amendments to reject the incorporation of

state timing rules and "to continue having the Bankruptcy Code itself dictate the applicable grace periods." Clark, *Law of Secured Transactions* at ¶ S6.03[2][b][i], p. S6-6 (1996 Supp.); *accord* James J. Wright & Robert S. Summers, *Uniform Commercial Code* § 32-4, pp. 258-59, n. 13 (4th ed. 1995) (rejecting Petitioner's argument as misconstruing the participle "perfected" in § 547(e)(2)(A) and as leaving "very little for section 547(e)(2)(B) to do").

Collier on Bankruptcy recognizes that the new conforming amendment to § 547(e)(2)(A) clarified whatever ambiguity may have existed under the prior version. 5 L. King, *Collier on Bankruptcy* ¶ 547.05, p. 547-69, n. 1 (15 ed. rev. 1997). Collier's flatly rejects the argument that the current version of § 547 incorporates state law relation-back periods:

> If the financing statement is filed more than 20 days after the debtor receives possession of the collateral, the transfer (security interest) will be deemed perfected on the date of filing without the assistance of the relation back doctrine. In addition, the secured party will not be saved by § 547(e)(2)(A) because it perfected more than 20 days after the transfer took place.

Id. at ¶ 547.08[1], pp. 547-89.

Although there has been little time for much other scholarly commentary on the 1994 amendments, Professor Zinnecker's exhaustive analysis of the current language of § 547 and related provisions, the legislative history, and the policies underlying preference law similarly concludes that § 547(e) establishes a uniform federal relation-back period. *See* Timothy R. Zinnecker, *Purchase Money Security Interests in the Preference Zone:*

Questions Answered and Questions Raised by the 1994 Amendments to the Bankruptcy Code § 547, 62 Mo. L. Rev. 47 (1997).

Thus, rather than supporting Petitioner's position, the plain meaning of the post-amendment version of § 547(e)(2)(A) establishes a uniform 20-day federal safe harbor for the perfection of purchase money security interests. The only supporting authority cited by Petitioner or Amici Curiae that relates to the current language of § 547 is an ambiguous reference in colloquy between two Senators. Even if read as Petitioner suggests, that dialogue is refuted by both the language of the amendment and the more authoritative official committee report that accompanied the bill. *See* H.R. Rep. No. 103-835, 103d Cong., 2d Sess. 45 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3354.

B. The Term "Perfected" As Used In § 547(e)(2)(A) Refers To The Performance Of The Acts Necessary To Perfect A Security Interest.

The plain meaning of Bankruptcy Code provisions must be derived from reading the statute as a whole, and not from pulling a single word or phrase out of context. *See United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 630, 98 L. Ed. 2d 740, 748 (1988). While Petitioner focuses narrowly on the word "perfected" in § 547(e)(2)(A) and asserts that its plain meaning refers to the *effect* of becoming perfected, a careful reading of that subsection strongly suggests that the term is used to refer instead to the performance of those *actions* required by state law in order to become perfected. That interpretation is confirmed by reading § 547(e)(2)(A) in the context of the related sub-sections of § 547. And, it becomes inescapable when § 547(e)(2)(A) is read in the context of its relationship to the broader Bankruptcy Code

scheme for dealing with state law relation-back rules, as embodied in § 362(b)(3) and § 546(b).

1. Subsection 547(e)(2)(A) Refers To A Time Period Between Those Actions Necessary To Create A Security Interest And Those Necessary To Perfect It.

Current § 547(e) is the result of almost 100 years of evolution of the bankruptcy rules designed to deal with the problem of secret liens. The anti-secret lien policy is separate and distinct from the more commonly discussed preference law policies of furthering distributive equity and discouraging last minute asset grabs. *See* Epstein, *Bankruptcy* at § 6-11, p. 542.

Legal responses to the problem of secret liens and the evils that can arise from the debtor's ostensible ownership of assets that are encumbered by undisclosed third-party interests date back to the earliest reported fraudulent conveyance and preference opinion of *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601), where the debtor preferred one creditor over another by transferring a secret title to assets, while retaining possession. There the court reasoned, *inter alia*, that the secret interest was a fraud on creditors because it created the false impression that the debtor had unencumbered assets.

The anti-secret lien policy is not unique to bankruptcy law. Indeed, it is the very foundation for the U.C.C. requirement that security interests must be perfected in order to gain priority over competing claimants to the collateral. *See generally*, 1 Grant Gilmore, *Security Interests in Personal Property* § 15.1 (1965). Further, just like the anti-secret lien provisions of bankruptcy preference law, the U.C.C. also imposes a penalty for failure to perfect:

The rules for subordination of

> unperfected security interests have a purpose — in common with similar rules in all filing and recording systems — to impose sanctions for not adhering to the filing or recording requirements. Such rules are necessary to make the system effective and enforce the policy against secret liens.

Official Comment 9, U.C.C. § 9-301 (1972).

The bankruptcy law embodiment of this anti-secret lien policy dates to the Bankruptcy Act of 1898, where Congress sought to discourage secret liens by imposing bankruptcy consequences on transferees who delay complying with non-bankruptcy notoriety requirements. Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713, 750 (1985). Beginning in 1903, Congress settled upon the solution of postdating secret transfers and converting them into voidable preferences. Breitowitz, 3 Cardozo L. Rev. at 378.

This solution is carried forward in the elaborate, and highly technical timing rules of § 547(e). The general rule of § 547(e) for cases involving personal property is found in § 547(e)(2)(B), which provides that the transfer will be deemed to have occurred for preference purposes at the time of perfection. Epstein, *Bankruptcy* at § 6-11, p. 543. The exception is found in § 547(e)(2)(A), which provides that the transfer will be deemed to occur at the time of attachment (the effective date) if perfection takes place within 10 days of attachment, or, for purchase money security interests, within 20 days of the debtor's possession. *Id.* The precise scope of that exception is at issue in this case.

Section 547(e)(2) provides that a transfer is made:

> (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);
>
> (B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or
>
> (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —
>
> > (i) the commencement of the case; or
> >
> > (ii) 10 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2).

As discussed elsewhere in this brief, the express cross-reference to the enabling loan exception in subsection (c)(3)(B) refutes Petitioner's reading of § 547(e)(2)(A) as an open-ended provision that incorporates varying state law relation-back periods. However, even without the cross-reference, the plain reading of the statutory language refers to the time when all of the actions required for perfection are completed, and not to the effect of those actions once taken.

First, in its common and ordinary meaning the term "perfected" means the completion of certain required actions. Identical "is perfected" language is found in § 9-303(1) of the

U.C.C., which was the backdrop against which the § 547(e) rules were drafted. Under that section of the U.C.C., "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken." Uniform Commercial Code § 9-303(1) (1972).

Second, the language of both subsections (A) and (B) of § 547(e)(2) refer to specific points in time when the interest has become perfected: subsection (A) says "perfected at, or within 10 days after;" while subsection (B) uses the language "time such transfer is perfected" and "perfected after such 10 days." When a creditor waits until the 25th day to complete the actions necessary for perfection, that creditor's interest was not yet perfected on day one, or on day two, or on day 24. The creditor's interest first became perfected on day 25. And, whatever the retroactive effect of the actions taken on the 25th, the creditor's interest was not perfected prior to day 25. The Petitioner's attempted distinction between act and status misses the point that the creditor did not even have the status of perfection on day 24. The real distinction between the differing interpretations of § 547(e)(2) is a distinction between act and effect. In fact, the status of a purchase money secured creditor cannot even be determined until the time when the acts necessary for perfection have occurred, although once those actions do occur, the effect of perfection may relate back to the time of attachment.[5] Breitowitz, 3 Cardozo L. Rev. at 395. Thus, for preference purposes the transfer took place on day 25.

5. Similarly, Petitioner's attempt to distinguish this case based on the unique use of the term "perfected" in the Missouri motor vehicle act must be rejected. *See* Brief of Petitioner at 27. Whether it refers to actions or effects, federal law supplies the meaning of the term "perfected" in § 547(e)(2). *See Barnhill v. Johnson*, 503 U.S. 393, 397, 112 S. Ct. 1386, 1389, 118 L. Ed. 2d 39, 46 (1992) (federal law determines what is a transfer and when it is complete). It does not turn on a particular state statute's declaration of what that term means for state law purposes.

Third, Congress clearly knew how to distinguish between actions and the effects of those actions. As the first seven words of § 547(e)(2)(A) demonstrate, Congress chose to use the *effective* date of attachment for the point in time that starts the running of the 10-day period. In contrast, Congress chose the actual date of perfection as the end point of that period. Had Congress intended to incorporate state law relation-back rules into the determination of the perfection date, the language of the perfection clauses of subsections (A) and (B) would have paralleled the language of the attachment clause. For example, the perfection clause of § 547(e)(2)(A) should have read "if perfection of such transfer takes effect at, or within 10 days after such time. . . ."

Petitioner's reliance on the § 547(e)(1)(B) definition of perfection is equally unavailing. The § 547(e)(1) definitions merely identify the type of entity against whom the transfer must be perfected in order to survive preference attack. This provision is necessary because non-bankruptcy law provides differing levels of protection against lien creditors, competing secured creditors, and buyers; and because state law may require different actions to perfect an interest against each type of competing claimant. Thus, § 547(e)(1) carries forward the prior law's two-pronged approach of using a bona fide purchaser test for real property transfers and a lien creditor test for personal property transfers. *See generally*, Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 Stan. L. Rev. 3, 92, *et seq.* (1986) (tracing the evolution of the preference timing rules).

Like the "is perfected" language of § 547(e)(2), the "when" language of § 547(e)(1) refers to the completion of all of the steps required for perfection against the relevant type of entity. Using the above example of a security interest perfected on day 25, *when* is it first possible to establish that a lien creditor

"*cannot* acquire an interest that is superior to the interest" of the secured creditor? The term "cannot" requires a determination of the moment in time when a judicial lien creditor is barred from obtaining superior rights. *Beasley*, 102 F.3d at 335; *Loken*, 175 B.R. at 62. Until the date when the creditor actually perfects it is *possible* for a lien creditor to acquire a superior interest. Thus, the perfection date under § 547(e)(1)(B) is the 25th day, whether or not the act of perfection has a relation-back effect. Petitioner reads § 547(e)(1)(B) to back-date perfection to the point in time when a lien creditor "might not be able to acquire" a superior interest. Such a reading presumes perfection during the entire state law relation-back period. That creates an absurd result in those cases where the secured creditor perfects after the relation-back period has expired. In such cases, the secured creditor would be "perfected" during the relation-back period, but then become unperfected upon its expiration.

If Petitioner's response to this point is that § 547(e)(1)(B) should be applied retrospectively using 20/20 hindsight based on subsequent events, the question then becomes why the statute says "cannot acquire" instead of "could not have acquired." Even *Burnette* acknowledges that the grammatical tense of the language "seems to require the court to look at the facts at any moment from that perspective," and that "[t]his interpretation is consistent with Congressional intent." *Burnette*, 14 B.R. at 801.

2. *Section 547(c)(3) And Section 547(e)(2)(C)(ii) Must Be Given Effect.*

It is a cardinal rule of statutory construction that a statute should be interpreted to give effect to all of its provisions. *See, e.g., Citizens Bank of Maryland v. Strumpf*, __ U.S. __, __, 116 S. Ct. 286, 289-90, 133 L. Ed. 2d 258, 264 (1995); *Timbers*, 484 U.S. at 371, 108 S. Ct. at 630, 98 L. Ed. 2d at 748; *Colautti v.*

Franklin, 439 U.S. 379, 392, 99 S. Ct. 675, 684, 58 L. Ed. 2d 596, 607 (1979). Petitioner's interpretation of § 547(e)(2)(A) nullifies both the timing rule of § 547(e)(2)(C)(ii) and the enabling loan exception of § 547(c)(3).

While subsections (A) and (B) of § 547(e)(2) base the general timing rules for preferences on time of perfection, subsection (C) deals with the special case of transfers that have not yet been perfected as of the date of bankruptcy. The general rule, found in § 547(e)(2)(C), deems such transfers to have been made immediately before the date of the filing of the bankruptcy petition. This rule furthers the anti-secret lien policy by pulling the transfer of an unperfected interest into the pre-petition preference period so that it can be avoided as a preference. The exception to this rule is § 547(e)(2)(C)(ii). Under that provision, the general timing rule of § 547(e)(2)(C) applies only "if such transfer is not perfected at the later of the commencement of the case; or 10 days after such transfer takes effect between the transferor and the transferee." This 10-day provision ties into the basic § 547(e)(2)(A) timing provision and permits timely post-petition perfection to relate the transfer back to a pre-petition attachment date.

However, because of the trustee's power to avoid unperfected security interests under the § 544 "strong arm" provision, post-petition perfection under § 547(e)(2)(C)(ii) can apply to preserve a transfer only where the act of perfection has a relation-back effect. Breitowitz, 3 Cardozo L. Rev. at 397. But, if Petitioner's reading of the statute is correct, then in all relation-back situations, the security interest would be "perfected" at the time of attachment, which is a pre-petition point in time. Thus, "there would be no situation where post-petition compliance with section 547(e)(2)(C) would ever be necessary." *Id.* Further, the § 547(e)(2)(C) reference to the possibility of post-petition perfection confirms that it is the act

of perfection that governs. The only reading of the statute that gives full effect to all three subsections of § 547(e)(2) is one that interprets the term "perfected" to mean completion of the actions required for perfection.

Similarly, Petitioner's reading of § 547(e)(2)(A) renders the § 547(c)(3) enabling loan exception a nullity. Contrary to Petitioner's view, neither the general perfection definition of § 547(e)(1)(B) nor the basic timing language of § 547(e)(2)(A) deal with state law relation-back periods granted to purchase money lenders. Instead, Congress crafted a specific provision to accommodate such rules. Thus, § 547(c)(3) establishes a defense to the trustee's preference power for enabling loans that satisfy the conditions of that section. *See generally*, Countryman, 38 Vand. L. Rev. at 776-79. Although § 547(c)(3) protects most security interests that qualify as purchase money security interests under U.C.C. § 9-107, it is important to note that the requirements of § 547(c)(3)(A) are more stringent than those of the U.C.C. In addition, in order to qualify for the enabling loan defense, the security interest must be perfected within the grace period provided by § 547(c)(3)(B). Prior to the 1994 amendments, that grace period tracked the 10-day uniform provision of the U.C.C. § 9-301(2) purchase money security interest relation-back period. The 1994 amendments extended the grace period to 20 days in response to a trend in many states of adopting longer non-uniform grace periods in U.C.C. § 9-301(2). *See* H.R. Rep. No. 103-835 at 45, 1994 U.S.C.C.A.N. at 3354; Clark, *Law of Secured Transactions* at ¶ S6.03[2][c], p. S6-6. Thus, rather than defer to state law, § 547(c)(3) both limits the class of transfers that can take advantage of the relation-back concept and sets a uniform grace period for the perfection of such transfers. Congress' preference for a uniform period is reflected both in § 547(c)(3)(B)'s limitation of the grace period to 20-days in those situations where a longer state law period applies, and in its expansion of the grace period to 20

days in those cases where the state law period is shorter. *See In re Smallwood*, 204 B.R. at 520 (secured creditor protected by 20-day provision even though state law relation-back period was shorter).

Even if Petitioner's reading of the general timing rules of § 547(e)(2)(A) were plausible, the more specific provisions of § 547(c)(3) would control. Petitioner's interpretation of § 547(e)(2)(A) simply cannot be reconciled with § 547(c)(3). First, § 547(c)(3)(B) contains the same "is perfected" language as § 547(e)(2)(A). Thus, the enabling loan exception applies only to a security interest "that is perfected on or before 20 days after the debtor receives possession" of the collateral. If that language refers to the effect of perfection, rather than the act of perfection, then the amendment was unnecessary because the non-uniform state law relation-back rules would already operate to date perfection within the 10-day grace period of the pre-amendment version of the § 547(c)(3)(B) enabling loan exception.

Similarly, if state law relation-back concepts are incorporated into the § 547(e)(2)(A) timing rule, then the entire § 547(c)(3) enabling loan defense is unnecessary. *See* Zinnecker, 62 Mo. L. Rev. at 83. By relating perfection, and thus the time of transfer, back to the date of attachment, the § 547(b)(2) "antecedent debt" requirement for a preference would be negated in almost all purchase money situations. Thus, there would be no preference to trigger the need for a defense. And, in the rare factual context where an antecedent debt did arise, the § 547(c)(1) "contemporaneous exchange" defense[6] would provide ample protection. Petitioner fails to explain what purpose § 547(c)(3) serves if its interpretation of § 547(e)(2)(A) is adopted.

6. Section 547(c)(1) protects a transfer that was intended to be a contemporaneous exchange for new value and that was in fact a substantially contemporaneous exchange.

The only sensible way to read the related § 547 provisions is to interpret the term "perfected" to refer to the act of perfection. In this way the timing rules of all three subsections of § 547(e)(2) are given effect. Such a reading also gives effect to both § 547(c)(3) and the cross-reference to that section that was added to § 547(e)(2)(A). The § 547(e)(2)(A) cross-reference to § 547(c)(3)(B) creates an exception to the usual 10-day rule and establishes the attachment date as the date of transfer for enabling loans that both satisfy the requirements of § 547(c)(3)(A)[7] and that are perfected within 20 days of the debtor's possession of the collateral. While that alone will defeat the antecedent debt element of the trustee's *prima facie* case in most situations, the § 547(c)(3) defense will protect any remaining enabling loans, so long as the act of perfection occurred within the 20-day grace period.

C. Congress Expressly Rejected The Incorporation Of Relation-Back Periods Into Preference Law.

Congress was well aware of the need to balance the conflicting interests of bankruptcy law and the legitimate state law interests reflected in relation-back rules. It chose to address that issue in § 546 of the Bankruptcy Code, which deals with a variety of limitations on the trustee's avoiding powers. Subsection 546(b) provides, in relevant part:

> (1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that —
>
> (a) permits perfection of an interest in property to be effective against an

7. The § 547(c)(3)(B) reference to "such property" incorporates the § 547(c)(3)(A) enabling loan requirements.

> entity that acquires rights in such property before the date of perfection;
>
> * * *

11 U.S.C. § 546(b).

Thus, Congress knew how to incorporate and defer to state law relation-back rules. Further, it actually chose to do so in connection with the trustee's "strong arm" power under § 544, the statutory lien power under § 545, and the power to avoid post-petition transfers under § 549. Conspicuously absent from § 546(b) list is the trustee's § 547 preference power. Under the maxim *expressio unius est exclusio alterius*, that omission means that the trustee's preference power is not subject to relation-back rules. *See In re Walker*, 161 B.R. 484, 497 (Bankr. D. Idaho 1993), *aff'd* 77 F.3d 322 (9th Cir. 1996); *Murray*, 27 B.R. at 448; Epstein, *Bankruptcy* at § 3-18, p. 202. Therefore, Petitioner's argument that § 547 incorporates state law relation-back rules must be rejected.

Section 546(b) also refutes Petitioner's interpretation of the 1994 amendments. The simple addition of § 547 to the § 546(b) list would have been sufficient had Congress intended to defer to state law relation-back rules and thereby insulate from preference attack any purchase money security interest perfected within the relevant state law grace period. Congress instead chose to substitute a uniform federal 20-day grace period.

Finally, the language of § 546(b) confirms that the term "perfection" relates to the act of perfection, and not to its effect. Section § 546(b) speaks of laws that permit "perfection . . . to be effective . . . before the date of perfection." If the Bankruptcy Code uses perfection to refer to the effect of perfection, then the "date of perfection" under § 546(b) would be the *effective*

date of perfection. But, if that were so, then there never would be a case where perfection could be effective before the date of perfection, and § 546(b) would be a nullity. Clearly, § 546(b) refers to two different points in time, with the term "perfection" being used to refer to the time when the act of perfection occurs. Both § 547(c)(2)(A)'s use of the phrase "takes effect" and § 546(b)'s use of the term "effective" show that the Bankruptcy Code specifies when a legal fiction like retroactive effect is employed. The absence of such language in connection with § 547(e)(2)'s use of the term "perfected" shows that it is the act of perfection that controls in § 547(e)(2)(A).

D. Section 362(b)(3) Must Be Given Effect

The final piece of the Bankruptcy Code's scheme for dealing with relation-back rules is supplied by § 362(b)(3). Although § 546(b) subjects the trustee's powers under § 544, § 545, and § 549 to state law relation-back rules, and limited preference protection is granted to related-back purchase money security interests under § 547(c)(3) and § 547(e)(2)(C)(ii), those provisions would be ineffective if the § 362 automatic stay prevented the secured creditor from taking the actions necessary to perfect its interest. *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 51-2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837-38. Thus, § 362(b)(3) creates an exception to the automatic stay for "any act to perfect . . . to the extent that such act is accomplished within the period provided under section 547(e)(2)(A)." Since both § 547(e)(2)(A) and § 547(e)(2)(C)(ii) specify identical 10-day periods that run from attachment, the automatic stay exception of § 362(b)(3) dovetails with the post-petition perfection rule of § 547(e)(2)(C)(ii) to permit a purchase money lender to perfect during the § 547(e)(2)(C)(ii) period without fear of violating the automatic stay. Further, since the 1994 amendments extended the § 547(e)(2)(A) period to 20 days from possession for enabling loans, § 362(b)(3) also creates a

20-day exception to the automatic stay for enabling lenders, which dates from possession.[8]

Section 362(b)(3) speaks of accomplishing an act "within the period provided under § 547(e)(2)(A)." However, § 547(e)(2)(A) does not establish a set period of time like the 90-day preference look-back period in § 547(b)(4)(A). Instead, it speaks in terms of when a transfer "is perfected." The two sections mesh nicely only if § 547(e)(2)(A) is read as setting forth a period of time within which the *act* of perfection must occur. *See* Epstein, *Bankruptcy* at § 3-18, p. 202. Thus, the act permitted by § 362(b)(3) must be performed within the time to act established by § 547(e)(2)(A).

Further, since the only interests that can be validated by post-petition perfection are those that have the benefit of relation-back rules (*see* Breitowitz, 3 Cardozo L. Rev. at 393), the Petitioner's interpretation of § 547(e)(2)(A) causes the perfection date to collapse into the attachment date. There would thus be no period of time created by § 547(3)(2)(A) in the very class of transfers that § 362(b)(3) was designed to protect. At a minimum, this forces a tortured reading of § 362(b)(3). Alternatively, Petitioner's interpretation of § 547(e)(2)(A) could create an open-ended period of time for post-petition perfection. For example, if § 547(e)(2)(A) refers to the *effective* date of perfection, then § 362(b)(3) merely requires that the act to perfect be accomplished within the period that would cause perfection to be effective within 10 days of attachment (or 20

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8. If the post-petition perfection of an enabling loan occurs more than 10 days after attachment, but less than 20 days after possession, then § 547(e)(2)(C)(ii) would not apply. Thus, § 547(e)(2)(C)(i) would deem the transfer to occur immediately before bankruptcy, creating an antecedent debt and subjecting the transfer to preference attack. However, since perfection did occur within 20 days of possession, the § 547(c)(3) defense would protect the transfer from avoidance.

days of possession). If that result was intended, it could have been accomplished much more easily by adding § 547 to the § 546(b) list and by deleting the reference to § 547(e)(2)(A) from § 362(b)(3). Further, such an open-ended post-petition perfection period would delay the administration of bankruptcy cases. Chapter 13 is designed to be an expedited proceeding. Absent an extension for cause, the debtor must file a plan within 15 days of the petition date. F.R. Bankr. P. Rule 3015(b). An open-ended post-petition perfection period would make it difficult to determine the creditor's secured status in a timely fashion. While the time problems are less serious in most Chapter 7 and 11 cases, the need for expedited perfection remains.

In short, interpreting § 547(e)(2)(A) to refer to the effect of perfection is not consistent with the plain language of that section, and it does violence to numerous related Bankruptcy Code provisions. In contrast, interpreting § 547(e)(2)(A) to refer to the act of perfection gives full effect to all related provisions of the Bankruptcy Code and harmonizes the operation of the Bankruptcy Code provisions dealing with relation-back rules.

II.

CONGRESS INTENDED TO ADOPT A UNIFORM FEDERAL RELATION-BACK RULE FOR PREFERENCE ACTIONS.

Although this Court generally follows the plain language of the statute in construing Bankruptcy Code provisions, both the legislative history and the prior law often provide helpful interpretive guidance. *See, e.g.*, *Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S. Ct. 773, 779, 116 L. Ed. 2d 903, 912 (1992) (prior law); *Timbers*, 484 U.S. at 380, 108 S. Ct. at 635, 98 L. Ed. 2d at 754 (legislative history); *see generally*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S.

Cal. L. Rev. 845, 847 (1992) ("legislative history helps appellate courts reach interpretations that tend to make the law itself more coherent, workable, or fair"). In the instant case, both the legislative history of § 547 and its relationship to the prior law confirm that § 547 establishes a uniform relation-back period, rather than incorporating the varying relation-back periods of applicable state law.

There appears to be no dispute among the courts or commentators about Congress' intent regarding the incorporation of state law relation-back periods. Even the *Burnette* opinion makes clear that both the legislative history of § 547(e) and its evolution from the related provisions of the prior law demonstrate an intent to establish a uniform federal relation-back period. *See Burnette*, 14 B.R. at 797-801; *see generally*, Zinnecker, 62 Mo. L. Rev. at 73 - 76.

The preference provisions of the Bankruptcy Code are based on § 60 of the Bankruptcy Act of 1898. *See* 11 U.S.C. § 96 (1968). Like the current law, § 60(a) used a lien creditor test to determine the date when personal property transfers were deemed to have occurred for preference law purposes. Thus, the time of perfection generally determined the date of the transfer. Like the current law, the Bankruptcy Act also provided a limited 21-day relation-back exception. Thus, under § 60(a)(7), the date of attachment was used as the date of transfer if the security interest was perfected within the grace period allowed by applicable state law. Zinnecker, 62 Mo. L. Rev. at 74. However, the grace period did not extend beyond 21 days after attachment even if the applicable state law grace period exceeded 21 days. *Id.* In contrast, if the state law grace period was less than 21 days, then the secured creditor was required to comply with the shorter state law period. *Id.* Thus, under prior law, the preference rules incorporated state law grace periods only to shorten the relation-back period, never to extend it.

The changes that resulted in the current provision began with the 1970 report of the National Bankruptcy Conference's Committee on Coordination of the Bankruptcy Act and the Uniform Commercial Code. *See* Report of the Committee on Coordination of the Bankruptcy Act and the Uniform Commercial Code, *reprinted in* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 204 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6164. The only significant change proposed by the Committee was to adopt a fixed 21-day grace period, "without any provision for cutting back the 21-day period if an applicable filing statute uses a shorter period." *Id.*, 1978 U.S.C.C.A.N. at 6172. Further, although the 10-day relation-back period of UCC § 9-301(2) was the only applicable grace period under Article 9, the Committee recommended retaining the 21-day period because it had become familiar to the bar. Finally, on the question of what constitutes perfection, the Committee Report states:

> Under the Draft definition (as under Article 9 itself) there is no perfection until (1) any act required of perfection (e.g. filing) has been accomplished and (2) "an interest in the property" has been transferred.

Id., 1978 U.S.C.C.A.N. at 6178-79.

The Commission on the Bankruptcy Laws of the United States adopted the recommendations of the Committee, except that it substituted a 10-day grace period for the prior 21-day period. *See* Report of the Commission on the Bankruptcy Laws of the United States, Pt. II, § 4-607(g)(7), *reprinted in* L. King, Collier on Bankruptcy (15th ed. rev. 1977) (app. vol. B). Congress followed the Commission's recommendation when it enacted § 547(e) as part of the Bankruptcy Reform Act of 1978. Zinnecker, 62 Mo. L. Rev. at 75. The legislative history of § 547(e) demonstrates that Congress intended a uniform grace period for the perfection of security interests. It also shows that

Congress used the term perfection in its Uniform Commercial Code sense, which focuses on the acts required for perfection and not on its effect.

If Congress had intended to incorporate state law grace periods, prior § 60(a)(7) provided a statutory model that incorporated shorter grace periods. However, instead of expanding that concept to encompass longer grace periods, "Congress both deleted any reference to state law and shortened the applicable grace period to more closely parallel the then-existing grace period found in the only applicable provision of Article Nine." *Id.* at 76.

Congress again addressed the relation-back issue with two technical amendments in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Although no legislative commentary accompanied the changes, the grace period in the § 547(c)(3)(B) enabling loan exception was changed to more closely parallel U.C.C. § 9-301(2) by running it from the debtor's possession of the collateral, rather than from the date of attachment. Section 362(b)(3) was amended at the same time to clarify that the automatic stay did not prevent the post-petition perfection of enabling loans.

Finally, the 1994 amendments changed the § 547(c)(3)(B) enabling loan grace period to 20 days from possession and added to § 547(e)(2)(A) a cross-reference to the newly amended grace period of § 547(c)(3)(B). Those changes were intended to address the trend in many states toward adoption of longer non-uniform grace periods. As stated in the House Report:

> Section 547(c)(3) of the Bankruptcy Code provides that a trustee may not avoid the perfection of purchase-money security

> interest as a preference if it occurs within 10 days of the debtor receiving possession of the property. This section conforms bankruptcy law to most State's practice by granting purchase-money security lenders a 20-day period in which to protect their security interest.

H.R. Rep. No. 103-835 at 45, 1994 U.S.C.C.A.N. at 3354. Thus, Congress was aware of the trend toward longer non-uniform grace periods. Its response was to adopt a set 20-day period, rather than to defer to state law. Purchase money security lenders were granted "a 20-day period in which to protect their security interest," and not an open-ended state-based period.

The dialogue between Senators Sasser and Heflin that is relied upon by Petitioner does not rebut this conclusion. That discussion occurred in April 1994 and it related to a bill that did not become law. The House bill that did become law was not introduced until the following September. *See* H.R. 5116, 103d Cong., 2d Sess. (1994); 140 Cong. Rec. H 10,006-06 (September 28, 1994). Such colloquy is entitled to very little weight, and certainly not as much weight as the official committee report that accompanied the bill that was enacted. *Cf. Heintz v. Jenkins*, 514 U.S. 291, 298, 115 S. Ct. 1489, 1492, 131 L. Ed. 2d 395, 401 (1995) ("simply represents the views of one informed person on an issue about which others may (or may not) have thought differently"). Finally, the discussion is ambiguous and provides equal support for both sides of the argument. While Senator Sasser's question clearly raises the issue of motor vehicle statutes that provide relation-back periods longer than 20 days, he acknowledges that "there is no statutory language to codify [the *Busenlehner* and *Hesser* interpretations]." 140 Cong. Rec. S4536-37 (daily ed. April 20, 1994). Senator Heflin responds to the question in language similar to the committee report, stating, "The Committee's decision to increase the time period to 20 days was proposed to conform bankruptcy law practices to most State's practices." *Id.* He "clarifies" Senator Sasser's point by asserting that state law relation-back statutes "do not affect the time of transfer pursuant to section 547." *Id.* Senator Sasser then undermines his own question by stating that "Federal uniformity is keyed to the date on which the debtor receives possession of such property which then activates the running of the 20 day period under section 547." *Id.* Thus, the most that can be said of this excerpt is that Congress was aware of the problem of longer relation-back periods in some motor vehicle statutes at least six months before it passed the 1994 amendments. But, as the language of both the amendment and the official committee report show, Congress' solution to that problem was to adopt a uniform 20-day relation-back period.

The drafting history of the Bankruptcy Code and of the amendments to § 547 demonstrate that the current section carries forward a long tradition of imposing a federal limitation on relation-back provisions. While Congress certainly could have deferred to state law in § 547, Congress' power to establish "uniform Laws on the subject of Bankruptcies throughout the United States" clearly authorizes its choice of a uniform federal rule.[9] *See* U.S. Const, art. I, § 8, cl. 4.

III.

A UNIFORM FEDERAL RULE FURTHERS BANKRUPTCY PREFERENCE POLICY.

At its core, bankruptcy law deals with the question of what

9. Unlike the application of § 548 to mortgage foreclosure sales that was addressed in *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994), the long history of a uniform federal relation-back rule shows that § 547(c)(3) and § 547(e)(2)(A) do not "disrupt the ancient harmony" between bankruptcy law and state security law. *See id.* 511 U.S. at 543, 114 S. Ct. at 1764, 128 L. Ed. 2d at 567.

should be done when the debtor cannot satisfy all of its obligations. Thus, it is the very essence of bankruptcy law to upset the expectations of various parties who had pre-petition relationships with the debtor. The preference rules help determine which of those parties must share the bankruptcy burden.[10] In fact, almost all transactions that are attacked as preferences are fully enforceable and valid state law transactions in the absence of bankruptcy. Delayed perfection subjects an otherwise valid security interest to preference attack. As a result the lender loses its privileged position and must share the bankruptcy burden by receiving only its *pro rata* share of the assets. While that is not what the lender expected, it is exactly how the other unsecured creditors are treated. And, just like the lender, they also extended value to the debtor and expected to have their expectations satisfied.

Further, it was not irrational for Congress to conclude that the goal of fairness was better served by holding every purchase money secured creditor to the same preference standard, rather than having identically situated creditors treated differently based solely on differences in the local relation-back rules. Other important bankruptcy interests, such as administrative efficiency similarly support a uniform, easy to administer relation-back rule. Incorporation of state law would not merely result in the possibility of different relation-back periods for creditors from different states. Even for creditors from the same state, different periods, triggered by different events, and running from different points in time might apply depending on the class of creditor and the nature of the collateral. *See, e.g.*, *Walker*, 161 B.R. at 496 (discussing multiplicity of periods within a single state).

10. Avoidance of a tardily perfected security interest results in no windfall to an individual debtor. The debtor cannot claim an exemption in the recovered asset because the transfer of the security interest was voluntary. *See* 11 U.S.C. § 522(g).

Finally, the timing rules of § 547(e)(2)(A) further the anti-secret lien policy of bankruptcy preference law. While state law relation-back rules reflect an exception to the similar anti-secret lien policy of the state recording statutes, unlimited deference to those state law rules could eviscerate the bankruptcy anti-secret lien policy. For example, West Virginia already grants a 60-day relation-back period to motor vehicle purchase money lenders. *See* W.Va. Code § 17A-4A-4(a) (1996). The Amici Curiae brief suggests that this reflects a six-fold difference between Massachusetts and West Virginia in terms the "commercially reasonable time" that it takes to perfect. Brief of Amici Curiae of the American Automobile Manufactures Association, *et al.* at 17. Whether West Virginian's really need 60 days to complete the forms, or whether political factors explain the difference, a 60-day delay in perfection raises substantially more serious secret lien issues than a 20-day delay. Sixty days is fully two-thirds of the 90-day preference look-back period of § 547(b)(4)(A). Further, Petitioner's argument provides no outside limit on the permissible length of such a relation-back period, or on the classes of creditors who could be the beneficiaries of such a period. The risk that Petitioner's argument poses to preference policy is not mere idle speculation. It already has been addressed by at least one court. As the lower court's opinion in the Ninth Circuit's *Walker* case explains, the Idaho relation-back statute at issue there applied to both purchase money and non-purchase money security interests. *See Walker*, 161 B.R. at 496; *see also* Idaho Code § 49-510(1) (1996). However, even more troubling was the fact that the statute was adopted "*solely* as a means of defending its beneficiaries against avoidance of their security interests in federal bankruptcy proceedings." *Walker*, 161 B.R. at 499 (emphasis in the original); *see also id.* at 489. As *Walker* demonstrates, Petitioner's argument calls for abdication of bankruptcy policy. Congress' instead chose accommodation. Its choice in § 547(e)(2)(A) to give *all* security interests a 10-day grace period from attachment,

and to give purchase money security interests a 20-day grace period from possession represents a reasonable balance between bankruptcy policy and state policy.

CONCLUSION

The Eighth Circuit's interpretation of § 547(e)(2)(A) is the only interpretation that harmonizes the preference timing rules with the related provisions of § 547(e)(2)(C)(ii), § 547(c)(3), § 362(b)(3), and § 546(b). Further it gives full effect to both Congressional intent and to the anti-secret lien policy of bankruptcy preference law.

Wherefore, for the foregoing reasons, Respondent respectfully requests that this Court affirm the Eighth Circuit's decision below.

Respectfully submitted,

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